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Executive Order 12,114 - Environmental Effects Abroad: Does It Really Further the Purpose of NEPA

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NOTES

EXECUTIVE ORDER 12,114—ENVIRONMENTAL EFFECTS ABROAD: DOES IT REALLY FURTHER THE PURPOSE OF NEPA?

I. INTRODUCTION

EXECUTIVE ORDER 12,114¹ IS A CROSS-PRODUCT of two separate vectors. On one axis it is a statement of foreign policy directing administrative review of the extraterritorial environmental effects of major federal activities. On the other it is an alleged resolution of a long-standing intergovernmental controversy concerning the applicability of the National Environmental Policy Act of 1969² to major federal actions having solely nondomestic environmental impacts. In either context, the Order should be viewed as an attempt by the United States to assume a more responsible role in world environmental affairs.

In his 1979 Environmental Message to Congress,³ President Carter posited a foreign environmental policy based on a wholistic concept of the planet earth.⁴ The President accentuated the need for international cooperation in dealing with global environmental problems.⁵ Implicit in his message was an understanding of the intimate relationships existing

¹ Exec. Order No. 12,114, 44 Fed. Reg. 1,957 (1979).

² National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1969) (current version codified at 42 U.S.C. § 4331 (1976)) [hereinafter referred to as NEPA].

³ 15 WEEKLY COMP. OF PRES. DOC. 1353 (Aug. 2, 1979).

⁴ In the message, President Carter introduced his global environmental programs with the following remark:

Efforts to improve the environment cannot be confined to our national boundaries. Ten years ago, at the dawn of the environmental decade, we landed on the moon. For the first time people could stand on the surface of another world and look at the whole earth. The sight of earthrise was awesome. It was also sobering. From that moment we could no longer avoid understanding that all life must share this one small planet and its limited resources. The interdependence of nations is plain, and so is the responsibility of each to avoid actions which harm other nations or the world's environment.

Id. at 1371.

⁵ Two programs addressing global environmental concerns were presented in the message: 1) the Program to Advance Protection and Wise Management of World Forests under which the President pledged continued United States support for the United Nation's Environment Programme's efforts to prevent world deforestation; and 2) the Comprehensive Acid Rain Assessment Program whereby an Acid Rain Coordination Committee was established, whose main duties include organizing joint international acid rain research programs. *Id.* at 1371-73.

between foreign environmental impacts and the United States' environmental integrity, and of the resulting federal duty to avoid the degradation of other nations' or the global environment. In this light, Executive Order 12,114 is an initiative towards actuating a principle of shared international-environmental responsibility.

The need for such responsibility has not just recently been discovered.⁶ The concept of international-environmental responsibility is found as a central theme in NEPA. NEPA is best known for its requirement of comprehensive environmental reviews of all "major Federal actions significantly affecting the quality of the human environment."⁷ Most litigation under NEPA has revolved around the domestic application of this so-called "Environmental Impact Statement" (EIS) requirement.⁸ However, Section 102(2)(F)⁹ of the statute gives NEPA an international

⁶ G.A. Res. 3129, 28 U.N. GAOR Supp. (No. 30) 49, U.N. Doc. A/9030 (1973), and G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 12) 50, U.N. Doc. A/2912 (1974), both embodied a concept of cooperation among nations in solving multinational environmental problems. The concept of "shared-environmental responsibility" is defined in G.A. Res. 3281 which states:

The protection, preservation and enhancement of the environment for the present and future generation is the responsibility of all States. All States shall endeavor to establish their own environmental and developmental policies in conformity with such responsibility. The environmental policies of all States should enhance and not adversely affect the present and future development potential of developing countries. All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. All States should cooperate in evolving international norms and regulations in the field of the environment.

CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES, art. 30. *See generally* Adede, *United Nations Efforts Toward the Development of an Environmental Code of Conduct for States Concerning Harmonious Utilization of Shared Natural Resources*, 43 ALBANY L. REV. 488 (1979).

⁷ National Environmental Policy Act, § 102(C), 42 U.S.C. § 4332(2)(C) (1976) dictates that all agencies of the Federal Government shall:

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effect which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

⁸ *See generally*, F. ANDERSON & R. DANIELS, *NEPA IN THE COURTS* (1973).

⁹ National Environmental Policy Act, 42 U.S.C. § 4332(2)(F) (1976).

scope. Section 102(2)(F) directs that "to the fullest extent possible" all federal agencies shall:

recognize the world-wide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment.¹⁰

In conjunction with NEPA's environmental impact statement requirement, Section 102(2)(F) has been interpreted as requiring the filing and circulation of impact statements for major federal actions which significantly affect another nation's environment or the global sphere.¹¹ Herein lies the controversial side of Executive Order 12,114.

Prior to the signing of the Executive Order, federal agencies had frequently disagreed on the extraterritorial reach of NEPA's EIS requirement. Agencies such as the Departments of Commerce, State, Defense and Treasury, along with the Export-Import Bank (Eximbank) opposed the extension of the environmental impact procedure.¹² At the same time, the Agency for International Development (AID) and the National Oceanic and Atmospheric Administration espoused the requirement.¹³ The controversy has not been limited to the administrative realm, for there has also been judicial consideration of the extraterritorial reach of NEPA.¹⁴ However, there has not been a conclusive determination of whether an EIS is required for major federal actions having solely extraterritorial effects. Executive Order 12,114 attempts to resolve this issue while striking an apparent balance between conflicting environmental and foreign policies.

The effectiveness of the Executive Order's solution to the "extraterritorial problem" is still undetermined. While the Order requires environmental review where none had previously been directed, there remains a question as to the quality of environmental review prescribed by the Order. This note will examine the Executive Order and compare its environmental review procedures with those mandated by NEPA. It will also evaluate the balance struck by the Order between environmental and foreign policy considerations.

¹⁰ *Id.* For legislative history bearing on this section, see 115 CONG. REC. 40,416 (1969) (remarks of Senator Jackson).

¹¹ See CEQ Draft Regulations on Applying NEPA to Significant Foreign Environmental Effects, *reprinted in* 8 ENVIR. REP. (BNA) 1495 (1978). See also notes 67-75 *infra* and accompanying text.

¹² See 8 ENVIR. REP. (BNA) 1462 (1978).

¹³ See Agency for International Development (AID) Environmental Regulations, 22 C.F.R. § 216 (1977); National Oceanic and Atmospheric Administration Announcement, 9 ENVIR. REP. (BNA) 1709 (1979).

¹⁴ See notes 21-40 *infra* and accompanying text.

II. BACKGROUND

Congress has authority to extend NEPA's procedural requirements to the extraterritorial activities of federal agencies.¹⁵ As a general canon of construction, directives in United States statutory law "apply only to conduct occurring within or having effect within the territory of the United States unless the contrary is clearly indicated by the statute."¹⁶ However, a statute's legislative history, in addition to its statutory language, may be used in determining its scope.¹⁷ An analysis of NEPA's legislative history presents special problems. While its legislative history indicates that the statute as a whole was to have an international field of influence,¹⁸ there is no mention of that scope in connection with the EIS requirement.¹⁹ Absent a clear mandate, courts have been hesitant to apply the stringent EIS requirement to extraterritorial impacts. Instead, courts have elected to wait for a stronger directive from either the legislative or executive branch. Administrative agencies, burdened with the responsibility of preparing environmental impact statements,²⁰ have been forced to rule on the extraterritorial issue, and have interpreted the statute within a context of the time and cost demands of their own activities.

Executive Order 12,114 is intended to directly answer the question of NEPA's extraterritorial application. The history of the extraterritorial issue is also the history of the Executive Order. A short summary of the key events of that judicial and administrative history follows.

¹⁵ See generally Comment, *Controlling the Environmental Hazards of International Development*, 5 ECOLOGY L.Q. 321, 359-62 (1976).

¹⁶ RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1965).

¹⁷ See *Foley Bros. v. Filardo*, 336 U.S. 281, 285-90 (1949) (Court refused to give extraterritorial effect to a labor statute, after examining the statute's legislative history).

¹⁸ The Congressional White Paper on a National Policy for the Environment, 115 CONG. REC. 29,078 (1969), urged that the statute take into account major environmental influences of foreign aid programs and other international developments. It states: "Environmental quality and productivity shall be considered in a world-wide context, . . . Although the influence of the United States policy will be limited outside of its own borders the global character of ecological relationships must be the guide for domestic activities." *Id.* at 29,079. These sentiments were echoed by Senator Henry Jackson during hearings on NEPA, 115 CONG. REC. 40,416 (1969). For an excellent article explaining the statutory arguments, both pro and con, for extraterritorial application of NEPA, see Note, *The Extraterritorial Scope of NEPA's Environmental Impact Statement Requirement*, 74 MICH. L. REV. 349 (1975).

¹⁹ Instead of referring to a "world environment" or an "international environment" NEPA simply requires that an EIS be prepared for major Federal actions "significantly affecting the quality of the human environment" 42 U.S.C. § 4332(2)(C) (1976 emphasis added).

²⁰ Administrative agencies are "responsible officials" within the context of the statute. See 42 U.S.C. § 4332(2)(C) (1976).

A. Judicial History

Recent litigation has strongly suggested that NEPA may fully apply to activities taking place within foreign sovereignties, yet the earliest cases in this area were not concerned with the extension of NEPA to foreign nations.²¹ Early litigation dealt with the more limited issue of whether NEPA was to apply to actions the effects of which were felt in the Trust Territories of the Pacific.

In *People of Enewetak v. Laird*²² the hereditary and elected leaders of the people of Enewetak Atoll sought a preliminary injunction under NEPA with respect to a Department of Defense nuclear warfare program. The plaintiffs, though not citizens of the United States, were granted standing to sue as ex-residents of the atoll.²³ The District Court of Hawaii ruled that the Trust Territory of the Pacific Islands was included within the purview of NEPA,²⁴ and subsequently enjoined the Department of Defense from continuing its blasting activities.²⁵ The basis of this holding was in the statutory language of NEPA. The district court reasoned that if Congress had intended the statute's field of control to be restricted to the United States, it would have used the word "United States," rather than the term "nation," in describing the range of certain NEPA requirements.²⁶ The court also adopted the colloquial meanings of the NEPA terms "human,"²⁷ "person"²⁸ and "man."²⁹

²¹ An exception is the relatively minor case of *Wilderness Society v. Morton*, 463 F.2d 1261 (D.C. Cir. 1972). The plaintiffs alleged that the Department of the Interior had failed to comply with NEPA in its issuance of permits for the trans-Alaska pipeline. During litigation the D.C. Circuit granted a Canadian environmental group's petition to intervene on grounds that its interests were not properly represented. However, the court avoided ruling on the extraterritorial application of NEPA (the group wanted the pipeline to go through Alaska, while American environmentalists wanted it to transgress Canada).

²² 353 F. Supp. 811 (D. Hawaii 1973).

²³ Enewetak Atoll is one of a number of small Pacific islands placed under United States control (but not sovereignty) pursuant to a trusteeship agreement approved by the Security Council of the United Nations on April 2, 1947.

²⁴ 353 F. Supp. at 815-19.

²⁵ It should be noted that at the time of the suit the Department of Defense had specific regulations extending the scope of NEPA beyond the domestic United States. *Id.* at 819.

²⁶ *Id.* at 816 (citing §§ 4331, 4341, 4342 and 4344 of NEPA).

²⁷ National Environmental Policy Act, § 102(C), 42 U.S.C. § 4332(2)(C) (1976).

²⁸ National Environmental Policy Act, § 101(C), 42 U.S.C. § 4331(c) (1976).

²⁹ National Environmental Policy Act, § 102(A), 42 U.S.C. § 4332(2)(A) (1976).

Several months later, the court reaffirmed its *Enewetak* ruling in *People of Saipan v. United States Dept. of the Interior*, 356 F. Supp. 645 (D. Hawaii 1973), *aff'd as modified*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975). This suit was to enjoin implementation of a lease agreement for the operation of a hotel on public land in Saipan. Plaintiffs sought to compel Saipan's government to prepare an environmental impact statement. The court held that although activities in Saipan were covered by NEPA, the formation of the lease agreement

The judicial branch often had been asked to apply legislation to the Trust Territories,³⁰ but rarely had been urged to extend the application of a statute to the realm of a foreign nation. In 1975, the District Court of the District of Columbia was presented with this complex issue. In *Sierra Club v. Coleman*,³¹ environmental organizations sought to enjoin further action by the Federal Highway Administration on the Darien Gap Highway in Panama and Columbia.³² The Highway Administration had prepared an environmental assessment³³ relating to the construction of the intercontinental highway. Plaintiffs alleged that this assessment was insufficient on grounds that it had not adequately discussed the environmental impact of the project on the society of local Indian tribes, nor had it properly addressed the dangers attendant to an increased transmission of aftosa, "foot-and-mouth" disease.³⁴

These two allegations are important because they refer to purely local environmental impacts. Purely local environmental impacts are those which only affect a foreign nation and do not have contacts with the territorial United States. Full extraterritorial application of NEPA will exist only when these purely local environmental impacts trigger

was not a *major* federal action within the meaning of the statute, therefore the plaintiffs were not vested with legal rights enforceable in federal court. *Id.* at 660.

³⁰ See, e.g., *Callas v. United States*, 253 F.2d 838 (2d Cir. 1958) (Tort Claims Act); *Aradanas v. Hogan*, 155 F. Supp. 546 (D. Hawaii 1957) (Immigration Act); *Brunell v. United States*, 77 F. Supp. 68 (S.D.N.Y. 1948) (Tort Claims Act).

³¹ 405 F. Supp. 53 (D.D.C. 1975), *rev'd sub nom.*, *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978).

³² The United States was to provide approximately two-thirds of the cost of constructing the highway. 405 F. Supp. at 54 n.1.

³³ 40 C.F.R. § 1508.9 (1978) defines an environmental assessment as follows:

"Environmental Assessment:"

- (a) Means a concise public document for which a Federal agency is responsible that serves to:
 - (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.
 - (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.
 - (3) Facilitate preparation of a statement when one is necessary.
- (b) Shall include a brief discussion of the need for the proposal, of alternatives as required by sec. 102(2)(E), of the environmental impacts of the proposed actions and alternatives, and a listing of agencies and persons consulted.

Compare note 7 *supra*.

³⁴ Plaintiffs also alleged that the environmental assessment was flawed since it had not been circulated (as required by 42 U.S.C. § 4332(2)(C) (1976)) and had not adequately discussed alternative routes for the highway (as required by 42 U.S.C. § 4332(2)(C)(iii) (1976)). 405 F. Supp. at 55.

the EIS requirement. The decision in *Sierra Club v. Coleman*³⁵ did not adopt this full extraterritorial application of NEPA's EIS requirement. The *Coleman* court merely stated that the purely local environmental impacts, in combination with the domestic environmental impacts (impacts on the territorial United States), were significant enough to necessitate the preparation of an EIS.³⁶

The Federal Highway Administration prepared an EIS, but the Sierra Club remained dissatisfied with the quality of environmental review. In 1976, the club again filed suit³⁷ alleging that the newly prepared EIS was insufficient. The trial court agreed and enjoined further federal action on the highway.

In *Sierra Club v. Adams*,³⁸ the Circuit Court of Appeals of the District of Columbia vacated the injunction. Notwithstanding the objections of the Sierra Club, the court held that the EIS was not deficient in its discussion of aftosa or in its analysis of the socio-economic effects on local Indians. Notably, the court chose not to reach the issue of extraterritoriality and merely assumed the applicability of NEPA without ruling on the question.³⁹ Thus, it became apparent that voluntary compliance with NEPA would moot the issue of extraterritoriality and prevent a ruling that NEPA was applicable to *all* extraterritorial activities.⁴⁰ Administrative agencies were able to circumvent NEPA by "voluntarily complying" only when brought to court.⁴¹

In *National Organization for the Reform of Marijuana Laws (NORML) v. United States Department of State*,⁴² voluntary compliance also prevented a ruling on the extraterritoriality of NEPA. NORML, a non-profit corporation advocating the decriminalization of marijuana, sought

³⁵ 405 F. Supp. 53 (D.D.C. 1975), *rev'd sub nom.*, *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978).

³⁶ 405 F. Supp. at 56.

³⁷ *Sierra Club v. Coleman*, 421 F. Supp. 63 (D.D.C. 1976).

³⁸ 578 F.2d 389 (D.C. Cir. 1978), *vacating* *Sierra Club v. Coleman*, 405 F. Supp. 53 (D.D.C. 1975) *as supplemented*, 421 F. Supp. 63 (D.D.C. 1976).

³⁹ "In view of the conclusion we reach in this case (that the EIS was sufficient), we need only assume, without deciding, that NEPA is fully applicable to construction in Panama. We leave the resolution of this important issue to another day." 578 F.2d at 390-91 n.14.

⁴⁰ In *Sierra Club v. Atomic Energy Comm'n*, 6 E.R.C. 1980 (D.D.C. 1974), a similar result was reached. The Sierra Club brought suit to compel the Atomic Energy Commission [hereinafter referred to as AEC] and Eximbank to prepare an EIS for their nuclear-plant export process. When the AEC voluntarily complied, the court refused to rule on the extraterritoriality issue. 6 E.R.C. at 1982.

⁴¹ For a discussion of the Darien Gap Highway cases, see Tarlock, *The Application of the National Environmental Policy Act of 1969 to the Darien Gap Highway Project*, 7 N.Y.U.J. INT'L L. & POL. 459 (1974).

⁴² 452 F. Supp. 1226 (D.D.C. 1978), *appeal docketed*, No. 78-1669 (D.C. Cir. July 18, 1978) [hereinafter referred to as NORML].

a judgment declaring that several federal agencies were in violation of NEPA for failing to prepare an EIS with respect to the United States' participation in the paraquat spraying of marijuana and poppy plants in Mexico.⁴³ The court found "that the participation of the United States in the program [was] a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of NEPA (the EIS section)." ⁴⁴ Instead of moving to the next logical plateau and deciding the question of the extraterritoriality of NEPA, the court disposed of the case on other grounds.⁴⁵

Both domestic and foreign impacts were generated by the spraying program. The Department of State agreed to prepare an EIS on the spraying program's impacts in the United States, while consenting to prepare only an environmental analysis⁴⁶ for the Mexican impacts. Deeming this substantial compliance with NEPA, the court found it unnecessary to reach the issue of extraterritoriality.⁴⁷

This holding constituted an expansion of the doctrine of *Sierra Club v. Adams*.⁴⁸ In *Adams*, the court agreed to avoid the issue of foreign impacts based on the voluntary preparation of an environmental impact statement.⁴⁹ In *NORML*, the court by requiring only the development of an environmental analysis, further reduced the likelihood that courts would address the extraterritoriality issue of NEPA. The content of the review in an environmental analysis is far less comprehensive than that of an EIS.⁵⁰ So much so, that it is probable that agencies would rather prepare environmental analyses on all their programs rather than to risk a ruling that NEPA is fully applicable to extraterritorial impacts. The decision in *NORML* suggested that the extraterritorial issue would

⁴³ United States financial assistance to the program consisted of twelve million dollars a year. The Department of State, the Agency for International Development, the Drug Enforcement Administration, and the Department of Agriculture were all involved in the project. 452 F. Supp. at 1231.

⁴⁴ *Id.* at 1232.

⁴⁵ *Id.*

⁴⁶ An environmental analysis is a document less comprehensive than an environmental assessment. See note 33, *supra*.

⁴⁷ Similarly, in view of defendants' willingness to prepare an "environmental analysis" of the Mexico effects of United States support of that nation's narcotics eradication program, together with the EIS required by NEPA as to the impact of that program upon the United States, the Court need not reach the issue and need only assume without deciding, that NEPA is fully applicable to the Mexican herbicide spraying program.

452 F. Supp. at 1233.

⁴⁸ 578 F.2d 389 (D.C. Cir. 1978).

⁴⁹ *Id.* at 391-92 n.14.

⁵⁰ 40 C.F.R. § 1502.4 (1979) delineates specific procedures and substantive requirements for environment impact statements. No such in-depth requirements exist for environmental analyses.

never be decided in the courts so long as judges were willing to use voluntary compliance as a basis for avoiding the issue.

This controversy was revived once again in *National Resources Defense Council v. Export-Import Bank*.⁵¹ In seeking a continuance of that action, the government acknowledged that the crucial issue in the case was the extraterritoriality of NEPA.⁵² However the action was never litigated. When Executive Order 12,114 was issued both parties consented to a dismissal of the suit.⁵³ At that time it was believed that the Executive Order would resolve the extraterritorial issue. The Executive Order does address the question of foreign impacts, but only in the framework of internal agency procedures and not as an interpretation of the scope of NEPA.⁵⁴ Consequently the issue of NEPA's reach is still in limbo; extraterritorial application has neither been refuted nor supported by the courts.

B. Administrative

In 1977 the Nuclear Regulatory Commission (NRC)⁵⁵ took a stand against the extraterritorial application of NEPA. Unlike the wavering position of the judiciary, the NRC's stance was bold and unequivocal. In *In the Matter of Babcock and Wilcox*,⁵⁶ the NRC held that NEPA did not require the preparation of an EIS to assess the purely local environmental impacts of a proposed export of nuclear reactor components.⁵⁷ The petitioners, a West German environmental group,⁵⁸ attempted to intervene in an export-licensing proceeding, alleging that the NRC could not act on an application for an export permit until it had prepared an EIS

⁵¹ No. 77-0080 (D.D.C., filed Jan. 14, 1977), *dismissed by stipulation of the parties*, Feb. 23, 1979.

⁵² Defendant's Motion to Hold Court Proceeding in Abeyance Pending Executive Determination of Environmental Policy for Agency Action Outside the United States, *Natural Resources Defense Council v. Eximbank*, No. 77-0080 (D.D.C., filed Jan. 14, 1977). (The Government sought to avoid the application of NEPA's EIS requirement to Eximbank's extraterritorial activities).

⁵³ Stipulation of Dismissal, Feb. 23, 1979, *Natural Resources Defense Council v. Eximbank*, No. 77-0080 (D.D.C., filed Jan. 14, 1977).

⁵⁴ Exec. Order No. 12,114 § 1-1, 44 Fed. Reg. 1,957, 1,958 (1979).

⁵⁵ The Nuclear Regulatory Commission is the successor of the Atomic Energy Commission (AEC). It was created as an independent regulatory commission in 42 U.S.C. § 5841 (1970).

⁵⁶ 5 N.R.C. 1332 (1977).

⁵⁷ *Id.* at 1336.

⁵⁸ The German organization was named "Burgeraktion Atomschutz Mittelrhein," and was primarily concerned with the preservation, protection and enhancement of the ecosystem of the Middle Rhine. The proceeding concerned the export of nuclear reactor components which were to be used in a reactor situated in the region. *Id.* at 1334.

for the site of the reactor.⁵⁹ The allegation drew heavily upon the statutory language of NEPA. The environmental group asserted that the export of the reactor components "significantly affected the human environment,"⁶⁰ and thereby triggered the EIS requirement although the effects of the export would be felt only in West Germany.

The NRC concluded that the words "human environment" only evinced a congressional concern for impacts on the global commons—areas not under the jurisdiction of any country, such as the polar regions.⁶¹ The Commission stated that there was no demonstrable legislative "intent to become involved in matters primarily or exclusively of interest only to a particular foreign sovereign."⁶²

The agency obviously felt that the application of NEPA to foreign activities was plainly impractical. In the NRC's opinion, flexibility was an essential characteristic of foreign policy. According to the Commission, the EIS requirement could never be attentive to the multitude of factors involved in international relationships.⁶³ An extension of the scope of NEPA would necessarily cause a stratification of this free-flowing system and would ultimately require interference with the internal affairs of other nations.⁶⁴ Primarily, this interference would emanate from the informational demands of the EIS requirement. The Commission pointed out that data for environmental review could only be obtained with the cooperation of a foreign entity.⁶⁵ Absent such cooperation, the agency felt that it would be placed in the position of threatening foreign nations with a cutoff of imports if they did not provide sufficient information. These demands would necessarily have adverse political consequences.⁶⁶ To

⁵⁹ The petitioners requested the preparation of a statement addressing the following issues: 1) the risks associated with the location of the facility in a heavily populated area; 2) the risks associated with locating near major thoroughfares; 3) the impact of the reactor on nearby drinking water reservoirs; and 4) the impact of routine radioactive emissions from the plant on the general public health. *Id.*

⁶⁰ *Id.* at 1335. Compare National Environmental Policy Act § 102(c), 42 U.S.C. § 4332(2)(C) (1976).

⁶¹ 5 N.R.C. at 1339 (1977).

⁶² *Id.*

⁶³ There must be a "concern for the practical problems of conducting foreign policy and responding to the vicissitudes of international relations." *Id.*

⁶⁴ *Id.* at 1343.

⁶⁵ *Id.* at 1345.

⁶⁶ The Department of State had written a letter to the Chairman of the NRC stating in part:

[T]hat any U.S. attempt to make site-specific assessments of environmental impacts within the territory of another country would have major, adverse political consequences. A majority, if not all, governments would be expected to take the position that, among other things: decisions affecting primarily their national environments are a matter of sovereign responsibility; relatedly, the degree and means of public par-

escape this situation, the NRC interwove its statutory interpretation of "human environment" with practical considerations and determined that NEPA could not be extended.

The NRC's far-reaching and absolute stance invited reply from environmentally-minded agencies. Some federal agencies took the position that NEPA could be extraterritorially applied without disrupting the workings of foreign policy. One of these agencies, the Council on Environmental Quality (CEQ),⁶⁷ promulgates regulations that have been given great weight by the courts as guidelines for the interpretation of NEPA.⁶⁸ In 1978, the CEQ circulated draft regulations designed to extend the scope of NEPA to extraterritorial activities.⁶⁹ The regulations allowed for the foreign application of NEPA and provided the necessary procedural mechanisms for implementing the change.⁷⁰

Both CEQ and the NRC began their initiatives with definitions of the NEPA term "human environment."⁷¹ Unlike the NRC, CEQ defined "human environment" to include foreign nations. Section 1508.13 of the draft regulations stated that "human environment shall be interpreted comprehensively to include the natural and physical environment and the interaction of people with that environment. The human environment is not confined to the geographical borders of the United States."⁷² Expanding or contracting the definition of "human environment" has a corresponding effect on the scope of the EIS requirement. By expanding this definition, CEQ substantively enlarged the purview of NEPA.

The NRC's definition of "human environment" was generated from its concern over the foreign policy ramifications of expanding NEPA. In seeking to apply NEPA to extraterritorial activities, CEQ attempted to address the foreign policy problems by suggesting alternative pro-

tipication in the national environmental decision-making process, which involves the relationship between the government and its citizens, should not be substantially influenced by the actions of other governments; and they have full competence to make the necessary analyses and judgments.

Id. at 1344.

⁶⁷ The Council on Environmental Quality was created in Title II of the National Environmental Policy Act of 1969, 42 U.S.C. § 4361 (1976). Pursuant to Exec. Order No. 11,514, 3 C.F.R. § 90s (1970), and Exec. Order No. 11,991, 3 C.F.R. § 1233 (1978), the CEQ has the authority to provide interpretations of NEPA's statutory language.

⁶⁸ See *Scientists' Institute for Public Information, Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079 (D.C. Cir. 1973).

⁶⁹ CEQ Draft Regulations on Applying NEPA to Significant Foreign Environmental Effects, *reprinted in* 8 ENVIR. REP. (BNA) 1495 (1978).

⁷⁰ *Id.*

⁷¹ 5 N.R.C. 1332, 1338-39 (1977).

⁷² CEQ Draft Regulations on Applying NEPA to Significant Foreign Environmental Effects, *supra* note 69 at 1495.

cedures for preparing environmental impact statements.⁷³ In spite of this effort, many agencies complained that the CEQ regulations were unrealistic.⁷⁴ Two main criticisms were leveled at the regulations: 1) that their issuance was beyond CEQ's authority since CEQ could only enact procedural extensions of NEPA⁷⁵ and 2) that the regulations would give rise to a private cause of action seeking to enforce compliance with the regulations, further upsetting the balance and timing of foreign relations.⁷⁶ Essentially, the agencies argued that an expansion of NEPA to extraterritorial activities was more properly an executive or a legislative decision than one to be made by an advisory council.⁷⁷ Undoubtedly, these strong criticisms may be responsible for the fact that the draft regulations were never issued in final form.

III. THE EXECUTIVE ORDER

Executive Order 12,114 requires federal agencies to prepare environmental review documents for major federal actions having extraterritorial impacts. The President issued the Order pursuant to his constitutional powers, and not under any statutory grant of authority.⁷⁸ The Order was intended to preempt all previous attempts to require environmental review for actions abroad.⁷⁹

The Executive Order provides three types of environmental review; environmental impact statements, bilateral or multilateral environmen-

⁷³ Before circulating the foreign draft regulations, the CEQ streamlined the procedures for preparing environmental impact statements. In the CEQ Regulations for Implementing the Procedural Provisions of NEPA (40 C.F.R. § 1500 *et seq.* (1978)) (hereinafter cited as CEQ NEPA Implementation Regs.), the Council provided several mechanisms for shortening both the length of the EIS document (40 C.F.R. § 1500.4 (1978)) and the time necessary for its preparation (40 C.F.R. § 1500.5 (1978)).

⁷⁴ The Departments of Commerce, State, Defense, and Treasury; and Eximbank all opposed the draft of foreign regulations. *See* 8 ENVIR. REP. (BNA) 1462, 1463 (1978).

⁷⁵ Exec. Order No. 11,991, 3 C.F.R. § 1233 (1977), authorized CEQ to issue procedural regulations. This grant of authority excluded substantive extensions of the statute, however the argument assumes that there is a clear dividing line between procedure and substance. Such a distinction may be highly artificial.

⁷⁶ *See Export-Import Bank Act Amendments of 1978; Hearings Before the Subcomm. on Resource Protection of the Senate Comm. on Environment and Public Works on S.3077*, 95th Cong., 2d Sess. 124 (1978) (statement of Ray Marshall, U.S. Dept. of Labor).

⁷⁷ *Id.* at 108 (statement of William Bechham, Dept. of Treasury).

⁷⁸ Exec. Order No. 12,114, 44 Fed. Reg. 1,957 (1979).

⁷⁹ "This Order . . . represents the United States government's *exclusive and complete* determination of the procedural and other actions to be taken by Federal agencies to further the purposes of the National Environmental Policy Act, with respect to the environment outside the United States and its territories and possessions." *Id.* § 1-1, 44 Fed. Reg. at 1,957 (emphasis added).

tal studies⁸⁰ and concise reviews of environmental issues (including environmental assessments and analyses).⁸¹ Each type of review is paired with a corresponding federal action. Major federal actions significantly affecting the environment of the global commons triggers the preparation of an EIS.⁸² If a major federal action in one country causes significant environmental impacts in a nonparticipating neighboring nation, the responsible agency must provide either a multilateral environmental study or a concise review.⁸³ Programs which involve the export of toxic or radioactive materials also require either an environmental study or review.⁸⁴ Finally, the President directed federal agencies to conduct reviews of all actions affecting designated global resources. In this last category, an agency may use its discretion in choosing to prepare either an EIS, a bilateral or multilateral study, or a concise environmental review.⁸⁵

The Order also contains a variety of exemptions, exclusions, and modifications to mitigate the effects of the environmental review requirements on the implementation of foreign policy.⁸⁶ The agencies involved may use these mechanisms at their discretion. Exemptions are allowed on a case-by-case basis and permit agencies to exempt any action not having a significant effect on the environment outside the United States. Other exempted activities include directives of the executive branch, actions regarding national security, military activities, export licenses and permits (except for the export of nuclear production or utilization facilities), and votes at international conferences.⁸⁷

⁸⁰ *Id.* § 2-4(a)(ii), 44 Fed. Reg. at 1,958.

⁸¹ *Id.*

⁸² *Id.* § 2-4(b)(i), 44 Fed. Reg. at 1,958.

⁸³ *Id.* § 2-4(b)(ii), 44 Fed. Reg. at 1,958. A nonparticipating country is one which is not involved in the planning or implementation of a project. It is simply a bystander.

⁸⁴ *Id.* § 2-4(b)(iii), 44 Fed. Reg. at 1,958.

⁸⁵ *Id.* § 2-4(b)(iv), 44 Fed. Reg. at 1,958. The President will designate the resources (i.e. major forests, mountain chains, glacier areas, deserts) to be protected in this fashion. *Id.* § 2-3(d), 44 Fed. Reg. at 1,958.

⁸⁶ *Id.* § 2-5, 44 Fed. Reg. at 1,959.

⁸⁷ Section 2-5(a) of the Executive Order specifically provides:

[T]he following actions are exempt from this Order:

- (i) actions not having a significant effect on the environment outside the United States as determined by the agency;
- (ii) actions taken by the President;
- (iii) actions taken by or pursuant to the direction of the President or Cabinet officer when the national security or interest is involved or when the action occurs in the course of an armed conflict.
- (iv) intelligence activities and arms transfers;
- (v) export licenses or permits or export approvals, and actions relating to nuclear activities except actions providing to a foreign nation a nuclear production or utilization facility as defined in

Exemptions and categorical exclusions are also available in case of emergencies.⁸⁸ Categorical exclusions are groups of federal actions which, when taken together, are not expected to have a significant effect on the human environment, and consequently environmental review is not required.⁸⁹ The Order provides for exclusions in two situations: 1) where an action could not reasonably be perceived to cause a significant environmental impact⁹⁰ and 2) where emergency circumstances involving national security or foreign policy crises demand special treatment.⁹¹ Agencies are given the ultimate power to invoke exclusions, but may do so only after consulting with the CEQ.⁹²

Federal agencies may also modify the environmental review process to give proper weight to nonenvironmental considerations.⁹³ Modifications are adjustments made in the timing, content, and availability of environmental documents.⁹⁴ If a modification becomes necessary, environmental review only takes place in a limited fashion. The variations are primarily allowed to mitigate the adverse effects environmental review may have on sensitive foreign policy matters.⁹⁵ An agency may modify the review process where there is a need to act promptly, or when it is determined that one or more foreign policy priorities will be infringed upon if environmental review is strictly performed.⁹⁶ Due allowance is

the Atomic Energy Act of 1954, as amended, or a nuclear waste management facility;

(vi) votes and other actions in international conferences and organizations;

(vii) disaster and emergency relief action.

Id. § 2-5(a), 44 Fed. Reg. at 1,959. By excluding from the exemptions export licenses dealing with nuclear production or utilization facilities, the President made an effort to prevent repetition of the decision in *In the Matter of Babcock and Wilcox*, 5 N.R.C. 1332 (1977). The granting of export licenses for utilization facilities, *i.e.*, nuclear reactors, is within the NRC's jurisdiction. *See* 42 U.S.C. § 5841(f). The Executive Order dictates the preparation of an environmental document prior to the granting of a license. This is directly contrary to the NRC's previous ruling.

⁸⁸ Exec. Order No. 12,114, §§ 2-5(a)(vii), 2-5(c), 44 Fed. Reg. 1,957, 1,959 (1979).

⁸⁹ *See* CEQ NEPA Implementation Regulations, 40 C.F.R. § 1508.4 (1979).

⁹⁰ Exec. Order No. 12,114, § 2-5(c), 44 Fed. Reg. 1,957, 1,959-60.

⁹¹ *Id.*

⁹² *Id.* The CEQ is given the right to be consulted, but not the power to approve or disapprove an exclusion.

⁹³ *Id.* § 2-5(b), 44 Fed. Reg. at 1,959.

⁹⁴ *Id.*

⁹⁵ The modifications reflect an awareness of the possible infringements unchecked vigorous review could have on the conduct of foreign policy. *See* notes 64-66 *supra* and accompanying text.

⁹⁶ Section 2-5(b) allows agencies to modify the contents, timing and availability of documents, where necessary to:

(i) enable the agency to decide and act promptly as and when required;

also made for situations where agencies have little or no control over the implementation of a foreign program.⁹⁷ The agencies may use their discretion in determining whether to modify the process, and need not consult the CEQ.

The Executive Order explicitly bars any private attempts to enforce compliance with its terms. Section 3-1 states: "This Order is solely for the purpose of establishing internal procedures for Federal agencies to consider the significant effect of their actions on the environment outside of the United States, its territories and possessions, and nothing in this Order shall be construed to create a cause of action."⁹⁸ No private citizen or environmental group may sue an agency to enjoin the government's participation in an extraterritorial activity pending the preparation of environmental documents.⁹⁹ The Order envisions inter-agency enforcement, insulating decisions from privately instituted judicial review. Thus, private citizens are relegated to the role of spectators who must observe the workings of the foreign review operation from a distance.

IV. ANALYSIS: COMPARING EXECUTIVE ORDER 12,114 TO NEPA

The judicial and administrative histories of the Executive Order manifest a tendency on the part of agencies to eschew environmental

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- (ii) avoid adverse impacts on foreign relations or infringements in fact or appearance of other nation's sovereign responsibilities; or
 - (iii) ensure proper reflection of:
 - (1) diplomatic factors;
 - (2) international commercial, competitive and export promotion factors;
 - (3) needs for governmental or commercial confidentiality;
 - (4) national security considerations;
 - (5) difficulties of obtaining information and agency ability to analyze meaningfully environmental effects of a proposed action; and
 - (6) the degree to which the agency is involved in or able to affect a decision to be made.

Exec. Order No. 12,114, § 2-5(b), 44 Fed. Reg. 1,957, 1,959 (1979).

⁹⁷ See QUESTIONS AND ANSWERS ON INTERNATIONAL ENVIRONMENTAL EXECUTIVE ORDER, EXECUTIVE OFFICE OF THE PRESIDENT, CEQ DOCUMENT, 3 (Jan. 5, 1979).

⁹⁸ Exec. Order No. 12,114, § 3-1, 44 Fed. Reg. 1,957, 1,960 (1979).

⁹⁹ *Id.* In the first nine years following NEPA's enactment (January 1, 1970 through December 31, 1978), 1,052 lawsuits were filed alleging that federal agencies had not complied with the requirements of the Act. This represents almost ten percent of all federal proposals for which an EIS was necessary. Preliminary or permanent injunctions were issued by courts on an average of twenty-four times per year. Injunctions represent *gross* variations from the course of NEPA. In 1978 alone, 114 NEPA lawsuits were filed challenging federal actions or omissions. U.S. COUNCIL ON ENVIRONMENTAL QUALITY, TENTH ANNUAL REPORT ON ENVIRONMENTAL QUALITY, 588-91 (U.S. Gov't. Printing Offc. 1979).

review.¹⁰⁰ The "avoidance tendency" can be traced in part to a view that environmental considerations are externalities. To a certain extent, this attitude derives from a historical anomaly; administrators have long thought that the consideration of environmental factors was not essential to the effective planning and implementation of a project. Environmental values are not easily quantified as either costs or benefits.¹⁰¹ Given their inability to effectively interpret environmental data, and the seeming lack of tangible results stemming from such review, federal agencies have been hesitant to commit their limited resources to this area.

However, agency noncompliance with environmental directives is not solely derived from an arbitrary philosophical stance. Several intervening physical limitations make it difficult for agencies to engage in extensive environmental review. Among these factors are cost, time restrictions and conflicting congressional mandates.

Environmental review is expensive. For example, the NRC will spend at least fifteen to twenty million dollars a year conducting environmental surveys.¹⁰² While some agencies can pass along these additional costs to the industries they regulate,¹⁰³ others can only look to government funding. Even where agencies can charge their licensees additional fees, there comes a point beyond which the payment of a fee may become economically unfeasible.¹⁰⁴ Faced with limited budgets and over-extended outside sources of income, agencies are forced to minimize their use of environmental review.

The funding problems are compounded by time constraints. The preparation and circulation of an environmental impact statement may

¹⁰⁰ See Davis & Kamien, *Externalities and the Quality of Air & Water*, in *ECONOMICS OF AIR & WATER POLLUTION*, 13-9 (W. Walker ed. 1969); Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

¹⁰¹ See generally R. A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972).

¹⁰² This amount was interpolated from data contained in NUCLEAR REGULATORY COMMISSION, 1978 ANNUAL REPORT 257 (1978).

¹⁰³ The NRC raised its fees for operating licenses of uranium nulling plants from \$10,050 per application to a maximum of \$107,700. Fees for permits necessary to allow operation of a waste fuel burial site were increased 10,000% (\$3,000 to a maximum of \$323,000). In both cases, the NRC attributed additional costs primarily to environmental review. See NUCLEAR REGULATORY COMMISSION, 1978 ANNUAL REPORT 254 (1978).

¹⁰⁴ For example, the cost of obtaining the permits and licenses required for operating a nuclear reactor is already 2.4 million dollars. Countless other funds are necessary for developing support documents. *Id.* at 255. See also *Export-Import Bank Act Amendments of 1978: Hearing Before the Subcomm. on Resource Protection of the Senate Comm. on Environment and Public Works on S.3077*, *supra* note 76, at 64 (statement of Jack Carlson of the United States Chamber of Commerce) which argues that the end point of feasibility lies where the agency is unable to effectively perform its statutory mandate.

take as long as thirty-one months.¹⁰⁵ Many agency transactions require much shorter response times, in some cases only forty days.¹⁰⁶ Ultimately, a conflict must develop between an agency's desire to efficiently dispatch its business and its attempt to be environmentally responsible.

Many corporations demand that their applications be processed as quickly as possible. In industry, delays in construction or in putting a plant into operation can be economically devastating—time is precious. On the extraterritorial plane, this pressure is even greater because agencies risk the loss of exports or the alienation of a foreign ally if they fail to comply with an applicant's time demands. As a result, the force of economics undercuts the intangible benefits of environmental review.¹⁰⁷

Finally, some agencies operate under congressional mandates which are not easily reconciled with environmental review requirements. For example, the Eximbank's main responsibility is to promote exports.¹⁰⁸ As a natural consequence, the Eximbank has perceived its role as maximizing export potential while minimizing or ignoring environmental review.¹⁰⁹ If other conflicting organic mandates are left undisturbed,¹¹⁰ it can be expected that agencies will stand by their principal charges and shun any environmental review which interferes with the promotion of those duties.

It can be concluded that certain agencies will attempt to avoid environmental review if given unfettered discretion. It is not a case of bad faith, but rather of economical and political reality. Cost, time, and conflicting mandates will all enter into an agency's decision of whether to

¹⁰⁵ See EXPORT-IMPORT BANK OF THE UNITED STATES, 1977 ANNUAL REPORT (U.S. Gov't. Printing Offc. 1977). The CEQ NEPA Implementation Regulations may relax the pressures generated by time constraints. Section 1501.8(a) allows agencies to set time limits for the EIS process, provided "that the limits are consistent with the purpose of NEPA and other essential considerations of national policy." Among the factors which may be considered in determining a time limit is the "degree of public need for the proposed action, including the consequences of delay." 40 C.F.R. § 1501.8(b)(iv) (1979).

¹⁰⁶ See 124 CONG. REC. S.16,843 (1978); EXPORT-IMPORT BANK OF THE UNITED STATES, 1977 ANNUAL REPORT, *supra* note 105.

¹⁰⁷ See generally Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

¹⁰⁸ 12 U.S.C. § 635j(a) (1976). See also Export-Import Regulations, 12 C.F.R. § 401.1(a) (1978).

¹⁰⁹ See *Sierra Club v. Atomic Energy Commission*, 6 E.R.C. 1980 (D.D.C. 1974); *Natural Resources Defense Council v. Export-Import Bank*, No. 70-0080 (D.D.C., filed Jan. 14, 1977), *dismissed by stipulation*, Feb. 23, 1979.

¹¹⁰ Congress has acted in several instances to amend an agencies' statutory responsibilities to allow better evaluation of environmental factors. In 1976, Congress amended the charter of the Overseas Private Investment Corporation (hereinafter referred to as OPIC), expressly directing the agency to "develop and implement specific criteria intended to minimize the potential environmental implications of projects undertaken by investors abroad." 22 U.S.C. § 2199(h) (1976).

undertake environmental review. Agencies which are particularly vulnerable to such factors will not comply unless forcibly ordered to do so. Therefore, the Executive Order must be analyzed to determine its ability to require agencies to prepare environmental documents for their extraterritorial activities.

1. Mandate

The consideration of environmental factors is part of the domestic mandate of all federal agencies. Section 102 of NEPA¹¹¹ directs that "to the fullest extent possible: the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act."¹¹² This section has been interpreted as requiring a balanced decision-making process whereby agencies must weigh environmental costs against economic and technological benefits.¹¹³ NEPA amended the charters of each federal agency to include a charge to protect the environment of the territorial United States.¹¹⁴

NEPA places environmental review on the level of a mandate. As a result, there are very few circumstances in which an agency can be excused from conducting this analysis.¹¹⁵ But the Executive Order does not place extraterritorial environmental review on the same level as a mandate. It merely suggests a general procedural model for dealing with extraterritorial impacts.¹¹⁶ The Order neither contains broad-sweeping

¹¹¹ National Environmental Policy Act, § 102, 42 U.S.C. § 4332 (1976).

¹¹² This section should be read in conjunction with § 101(a) of NEPA, 42 U.S.C. § 4321 (1976), which states in part, "it is the continuing policy of the Federal Government . . . to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony. . . ."

¹¹³ See *Calvert Cliffs' Coord. Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972). *Accord*, *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972). "Environmental costs" are defined as those negative impacts, i.e., loss of forest lands, destruction of scenery, disruption of ecological niches, which derive from the implementation of a given project. See generally National Environmental Policy Act § 102(2)(B), 42 U.S.C. § 4332(2)(B) (1976).

¹¹⁴ A distinction must be made between "conflicting mandates" (as used in the previous section) and "directly conflicting mandates." "Conflicting mandates" are legislative charges which make it *difficult* for an agency to conduct environmental review. "Directly conflicting mandates" are congressional directives which make it *impossible* for an agency to perform environmental review. There are very few "directly conflicting mandates," but there are many "conflicting mandates." See W. ROGERS, *ENVIRONMENTAL LAW* 718 (1977).

¹¹⁵ One instance is where there is a "directly conflicting organic mandate." See *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976).

¹¹⁶ Exec. Order No. 12,114 § 3-1, 44 Fed. Reg. 1,957, 1,960 (1979).

statements of environmental policy, nor requires agencies to adjust their priorities to give equal weight to international environmental factors. Notwithstanding the strong language of NEPA, some agencies have attempted to avoid environmental review.¹¹⁷ The substantially weaker language of the Executive Order seemingly invites even more evasion.

The Order itself presents a fertile medium for the shunning of environmental considerations. As previously discussed, agencies may act with unfettered discretion in either exempting their own activities or in modifying their review processes.¹¹⁸ The choice to modify or exempt is an inter-agency decision requiring no outside approval.¹¹⁹ In comparison, NEPA does not provide for case-by-case exemptions, but rather directs that modifications be allowed only under the continuing supervision of the CEQ.¹²⁰ Some flexibility is necessary to avoid conflicts between environmental review and foreign policy—the question is how much flexibility? In the past, the NRC and the Eximbank have maintained that they are exempt from extraterritorial environmental review.¹²¹ Nothing in the Order requires them to change their outlook. The precatory language of the Executive Order appears to allow the NRC, Eximbank and other agencies to escape the burden of preparing environmental documents under the modification and exemption provisions. Consequently, there is a strong possibility that the Order may be too flexible.

With the exception of the State Department, agencies have adopted and implemented regulations which take full advantage of this flexibility.¹²² Certain agencies have interpreted the Order to be primarily a

¹¹⁷ See notes 100-103 *supra* and accompanying text.

¹¹⁸ Exec. Order No. 12,114 §§ 2-5(b) and (c), 44 Fed. Reg. 1,957, 1,959-60 (1979). See notes 109-111 *supra* and accompanying text.

¹¹⁹ Exec. Order No. 12,114 §§ 2-5(b) and (c), 44 Fed. Reg. 1,957, 1,959 (1979).

¹²⁰ "Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review." CEQ NEPA Implementation Regulations, 40 C.F.R. § 1506.11 (1978).

¹²¹ See, e.g., National Resources Defense Council v. Eximbank, No. 78-0080 (D.D.C., filed Jan. 14, 1977), *dismissed by stipulation*, Feb. 23, 1979; In the Matter of Babcock and Wilcox, 5 N.R.C. 1332 (1977).

¹²² The State Department regulations set forth that it is "the policy of the Department of State to use all practicable means, . . . to carry out the objectives of the Executive Order and to ensure that environmental effects outside of the United States are appropriately identified and considered in the Department's decisions on proposed actions encompassed by the Executive Order." 44 Fed. Reg. 67,004, 67,005 (1979). The State Department had opposed the extension of NEPA to extraterritorial activities via CEQ's Draft Regulations on Applying NEPA to Significant Foreign Environmental Effects. For regulations emphasizing the use of the Order's modifications and exemptions, see Department of

statement of foreign policy, and only to a lesser degree as a directive requiring environmental review.¹²³ The pervasive emphasis on administrative discretion, present both in the body of the Order and its implementation regulations, leaves open the possibility that agencies will avoid extraterritorial review.

2. Major Federal Actions

The environmental review procedures of NEPA and the Order are not triggered unless a particular proposal is a "major federal action."¹²⁴ Under NEPA, a "major action" has been defined as one requiring substantial planning, time, resources, or expenditures.¹²⁵ "Federal actions" are those dealing with the adoption of policies, the formulation of official documents, the implementation of programs, or the approval of specific development projects.¹²⁶ But these definitions give little meaning to the terms of Executive Order 12,114 because the Order was not issued as an extension of NEPA.¹²⁷

Pinpointing the Order's definition of a "major Federal action" is crucial. The interpretation of this phrase will cause a greater or lesser number of activities to be included in the scope of the Order. It is not necessary to invoke a modification or an exemption if an activity is not a "major federal action."¹²⁸ Agencies seeking to evade environmental review need only limit the breadth of the "major Federal action" category. This limiting process may be accomplished in a number of ways. For example, federal agencies may subdivide their activities into several or more components each of which is not sufficient enough to be

Defense Implementation Regulations, 44 Fed. Reg. 21,786 (1979) (to be codified at 32 C.F.R. § 197); Eximbank Implementation Regulations, 44 Fed. Reg. 50,813 (1979) (to be codified at 12 C.F.R. § 409).

¹²³ In stating its policy regarding the Executive Order, the Department of Defense explained: "The objective of the Order is to further foreign policy and national security interests while at the same time taking into consideration important environmental concerns." 44 Fed. Reg. 21,786, 21,787 (1979) (to be codified at 32 C.F.R. § 197.4(a)). The regulations also emphasize respect for foreign sovereignties: "Treaty obligations and the sovereignty of other nations must be respected and restraint must be exercised in applying United States laws within foreign nations. . . ." *Id.*

¹²⁴ See National Environmental Policy Act, § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976); Exec. Order No. 12,114, § 2-3, 44 Fed. Reg. 1,957, 1,957-58 (1979).

¹²⁵ See *Natural Resources Defense Council v. Grant*, 341 F. Supp. 356, 366-67 (E.D.N.C. 1972). *Accord*, *Citizens Organized to Defend the Environment v. Volpe*, 353 F. Supp. 520 (S.D. Ohio 1972).

¹²⁶ Regulations for Implementing the Procedural Provisions of NEPA, 40 C.F.R. § 1508.18(b) (1978).

¹²⁷ The Executive Order furthers the purpose of NEPA, but is not issued as a statutory supplement. Exec. Order No. 12,114, § 1-1, 44 Fed. Reg. 1,957, 1,957 (1979).

¹²⁸ See notes 92-96 *supra* and accompanying text.

"major."¹²⁹ It may also be possible for an agency to assign out its activities to private enterprises, thereby giving their projects a non-federal character.¹³⁰ Finally, agencies may particularize the definition of "major Federal Action" in such a manner as to cause very few of their programs to qualify. Regardless of the means chosen, the end result is that less environmental review will occur.

The term "major Federal action" is not defined in the Executive Order. Thus, agencies were left to implement their own definitions of this term, and the results have been far from uniform. A comparison of the Department of Defense (DOD) and the Department of Energy (DOE) implementing regulations bears out this lack of consistency.

The Department of Defense strictly confines the concept of "major Federal action" in such a manner as to cause very few of their projects to be "implemented or funded directly by the United States Government."¹³¹ A "major action" is an activity "of considerable importance involving substantial expenditures of time, money, and resources, that affects the environment on a large geographical scale or has substantial environmental effects on a more limited geographical area and that is substantially different from other actions, previously analyzed with respect to environmental considerations. . . ."¹³² The Department of Energy's definition differs from the Department of Defense's version in three regards. First, under the DOE regulations the approval of a project, (as

¹²⁹ An agency could take a proposal designed to build a twenty mile road and divide it into ten smaller proposals each of which is too insignificant to be a major federal action. Of course, the subdivisions may not be so obvious. *See* *Movement Against Destruction v. Volpe*, 361 F. Supp. 1360, 1384 (D. Md. 1973), *aff'd per curiam*, 500 F.2d 29 (4th Cir. 1974).

¹³⁰ *See, e.g.,* *Kings County Economic Community Dev. Ass'n v. Hardin*, 478 F.2d 478 (9th Cir. 1973) (subsidies); *Carolina Action v. Simon*, 389 F. Supp. 1244 (M.D.N.C. 1975) (revenue sharing); *First Nat'l Bank of Homestead v. Satson*, 363 F. Supp. 466 (D.C. 1973) (approval of national bank charter).

¹³¹ This section reads in full:

Federal Action means an action that is implemented or funded directly by the United States Government. It does not include actions in which the United States participates in an advisory, information-gathering, representational or diplomatic capacity but does not implement or fund the action; actions taken by a foreign government or in a foreign country in which the United States is a beneficiary of the action but does not implement or fund the action; or actions in which foreign governments use funds derived from United States funding.

Department of Defense Implementation Regulations, 44 Fed. Reg. 21,786 (1979) (to be codified at 32 C.F.R. § 197.3(b)). Note that this definition does not characterize the category of "Federal actions" as including the adoption of policies, the formulation of official documents, or the approval of projects. *See* note 126 *supra* and accompanying text.

¹³² Department of Defense Implementation Regulations, *supra* note 131 (to be codified at 32 C.F.R. § 197.3(e)). Major actions also do not include the "deployment of ships, aircraft or other mobile military equipment." *Id.*

opposed to the implementation or funding of a project), may be a "major Federal action."¹³³ Secondly, while the Defense Department limits federal actions to those directly implemented or funded by the government, DOE also includes actions which are indirectly implemented, funded, or approved.¹³⁴ These latter regulations would require environmental review where the United States merely causes an action to be implemented.¹³⁵ Lastly, the DOE regulations provide that an action need only be potentially subject to United States governmental control and responsibility to trigger the review requirement.¹³⁶ The Department of Defense would demand actual control over the project.¹³⁷

If, for example, the United States indirectly financed¹³⁸ the construction of a base of operations in a foreign country,¹³⁹ (this construction having environmental impacts on a nonparticipating country), differing amounts of environmental review would take place, depending on the agency sponsoring the activity. If the DOE were responsible, environmental documents would be prepared. Under the Department of Defense regulations no such review would be necessary because the project would be indirectly funded.

Thus, it is apparent that another weakness of the Executive Order is its failure to demand consistent application of its review requirements. Activities of federal agencies in participating foreign countries¹⁴⁰ are already, for the most part, beyond the purview of the Order. In such cases, review is only directed if toxic or radioactive materials are in-

¹³³ Department of Energy Implementation Guidelines, 44 Fed. Reg. 52,146, 52,150 (1979).

¹³⁴ *Id.*

¹³⁵ Federal actions do not include "actions in which the United States participates in an advisory, information-gathering, representational or diplomatic capacity but does not implement, fund or approve the action or *cause* the action to be implemented." *Id.* § 16.2.

¹³⁶ *Id.*

¹³⁷ Lack of control should be grounds only for the modification of the review process. See note 96 *supra*. It should not be the basis for totally avoiding the preparation of environmental documents. See note 131 *supra*.

¹³⁸ One way this might be accomplished is by transferring military arms to a country at a reduced price (this action would be exempted from review under section 2-5(b)(iii)(6) of the Order), causing a freeing up of foreign funds which in turn could be used to finance the project. Exec. Order 12,114, § 2-5(b)(iii)(6), 44 Fed. Reg. 1,957, 1,959 (1979).

¹³⁹ For a fact pattern closely paralleling this example, see *Gemeinschaft zum Schitz des Berlinear Baumeandes v. Marienthal*, 12 ENVIR. REP. (BNA) 1337 (D.D.C. 1978). A German environmental group was denied an NEPA injunction against the United States Army for construction of a military installation in Berlin.

¹⁴⁰ Participating countries are those involved in the implementation of a project.

volved.¹⁴¹ Combining the limited scope of the Order with the narrow definition of "major Federal action" implemented by several agencies, yields a situation where strikingly few extraterritorial activities trigger the environmental review requirements.

3. Content of review

Assuming environmental documents are prepared, there is still a serious disparity between the comprehensiveness of the review mandated by NEPA and that authorized by the Order. For major federal actions significantly affecting the territorial environment, NEPA requires the completion of an environmental impact statement (EIS).¹⁴² An EIS contains information on 1) the environmental impact of a proposal, 2) any unavoidable adverse environmental effects attendant to the implementation of a proposed action, 3) alternatives to the action, 4) the relationship between short-term uses of the environment and long-term productivity and 5) irreversible and irretrievable commitments of resources deriving from the action.¹⁴³ Of these components, the requirement that the impact statement address "alternatives to the proposed action" is the most critical. Alternatives to a proposal include the use of different sites, construction techniques, architectural designs, and products, and may also involve foregoing the project *i.e.*, the so-called "no-action" alternative.¹⁴⁴ The objective evaluation of a proposal necessitates the investigation of alternate courses of conduct.¹⁴⁵ Often improvements are made in a proposal based on the scrutiny of alternatives.¹⁴⁶ Absent the consideration of alternatives, an environmental document often becomes an ad hoc rationalization of a reviewed project's environmental merits.¹⁴⁷

¹⁴¹ Exec. Order No. 12,114, § 2-3(c), 44 Fed. Reg. 1,957, 1,957-58 (1979). For example, environmental review is not necessary for construction projects which have significant environmental impacts on participating nations.

¹⁴² National Environmental Policy Act § 102, 42 U.S.C. § 4332 (1976).

¹⁴³ See note 7 *supra*.

¹⁴⁴ See Jordan, *Alternatives Under NEPA: Toward an Accommodation*, 3 ECOLOGY L.Q. 705 (1973).

¹⁴⁵ NEPA reemphasizes the alternative requirement in section 102(2)(e) which reads: "(A)ll agencies of the Federal Government shall . . . study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(e) (1969).

¹⁴⁶ See *Sierra Club v. Froehlke*, 359 F. Supp. 1289, 1343 (S.D. Tex. 1973), *rev'd on other grounds*, 499 F.2d 982 (5th Cir. 1974). While it may be infeasible to opt completely for an alternative proposal, it may be possible to incorporate a feature of the alternative into the final proposal, *i.e.*, the use of some architectural feature, or alternate chemical composition.

¹⁴⁷ Environmental documents are to be considered before a decision is made on a proposal. "Ad hoc rationalizations" refer to situations where an agency makes

The examination of alternatives is generally omitted from an extra-territorial environmental review. With one possible exception,¹⁴⁸ documents prepared under the Order need not contain information on the alternatives to a proposed action. The Order does not specify the content of a bilateral or multilateral environmental study¹⁴⁹ or a concise environmental review.¹⁵⁰ In general, federal agencies who have issued regulations implementing the Order have not required a consideration of alternatives.¹⁵¹ Typical regulations are like those of Eximbank which define the content of environmental studies and reviews as including, where feasible:

- (1) A summary of the major findings and conclusions of any environmental review which has been undertaken in the foreign nation for the physical project; and . . .
 - (i) A brief review of the existing environment that would be affected by the physical project;
 - (ii) A statement as to the significant foreseeable environmental effects of the physical project;
 - (iii) A statement as to whether there are in effect any relevant environmental regulations or laws in the physical project area; and
 - (iv) A statement as to whether the applicant or any foreign governmental entity will be taking into account adverse environmental effects of the physical project.¹⁵²

The emphasis is placed on identifying environmental impacts, and on the accumulation of environmental data. Little attention is given to developing a means for mitigating adverse environmental impacts.

Without an examination of alternatives, data losses much of its significance. The investigation of alternatives serves to focus issues by high-

its decision to use a particular proposal, and then formulates the required environmental documents solely to comply with environmental review directives. See *generally* Scientists' Inst. for Pub. Information v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973).

¹⁴⁸ Exec. Order No. 12,114 § 2-3(a), 44 Fed. Reg. 1,957, 1,957 (1979) (EIS required for "major federal actions" significantly affecting the environment of the global commons).

¹⁴⁹ *Id.* § 2-4(a)(ii), 44 Fed. Reg. at 1,958.

¹⁵⁰ *Id.* § 2-4(a)(iii), 44 Fed. Reg. at 1,958.

¹⁵¹ See Department of Defense Implementation Regulations, 32 C.F.R. § 197.6, Enclosure 2, § D(1) (1979); Eximbank Implementation Regulations, 44 Fed. Reg. 50,813, 50,816 (1979) (to be codified in 12 C.F.R. § 409); Overseas Private Investment Corporation Implementation Guidelines, 44 Fed. Reg. 51,385, 51,386 (§ 6) (1979). But for rules requiring an analysis of alternatives, see Department of Energy Implementation Guidelines, 44 Fed. Reg. 52,146, 52,149 (§ 10) (1979); Department of State Implementation Regulations, 44 Fed. Reg. 67,004, 67,006, Subpart B(3)(c) (1979).

¹⁵² Eximbank Implementation Regulations, 44 Fed. Reg. 50,813 (1979).

lighting the good and bad points of a proposal.¹⁵³ These issues form the matrices upon which environmental impacts are projected, allowing for a deeper understanding of the relationships between economical, technological, and environmental factors. The inclusion of alternatives in an environmental review document forces agencies to resolve all the issues presented therein, while serving as a barometer for the adequacy of the document's preparation.¹⁵⁴ Simply put, alternatives underline the shortcomings and mistakes in an environmental analysis, acting as a "quality control" component. By excluding the evaluation of alternatives from its review requirements, the Order has relegated its environmental documents to the role of gathering information without objectively interpreting it. Moreover, the quality safeguards which the consideration of alternatives provides are not present. Bilateral or multilateral environmental studies and concise environmental reviews may well identify adverse environmental impacts without causing them to be mitigated.¹⁵⁵

Further, the Order may not even cause the collection of all environmental impacts. It specifically precludes review of social and economic environmental effects.¹⁵⁶ The significance of this omission is illustrated by a situation in Indonesia where farmers had used an imported pesticide¹⁵⁷ to control a destructive insect which was present in their rice fields. This toxin, however, also killed all the fish in the rice paddies, and as a result destroyed a main source of income, caused the elimination of natural fertilizers, and disrupted a major component of the ecosystems insect-control mechanism.¹⁵⁸ The farmer's diets were changed, and the structure of their local society was deeply affected.¹⁵⁹

If the pesticide had been utilized in a governmental action in the territorial United States, all these impacts would have been described in

¹⁵³ See *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975); *Environmental Defense Fund, Inc. v. Froehlke*, 473 F.2d 346, 351 (8th Cir. 1972).

¹⁵⁴ If an alternative proves less environmentally hazardous, agencies are given a burden of showing why a proposal should be implemented without alteration.

¹⁵⁵ The Department of State requires officials to include in environmental studies a list of possible measures "that could be taken to mitigate harmful environmental effects." 44 Fed. Reg. 67,004, 67,007, Subpart B(3)(c)(2) (1979). Without a consideration of alternatives, the difficulty of developing mitigation measures, is greatly increased.

¹⁵⁶ "For the purposes of this Order, 'environment' means the natural and physical environment and excludes social, economic, and other environments." Exec. Order No. 12,114, § 3-4, 44 Fed. Reg. 1,957 (1979). See *Chelsea Neighborhood Ass'n v. Postal Service*, 516 F.2d 378 (2d Cir. 1975).

¹⁵⁷ The exportation of toxic substances is an activity requiring environmental review under Executive Order 12,114, § 2-3(c)(1), 44 Fed. Reg. 1,957, 1,958 (1979).

¹⁵⁸ Remarks by Charles Warren, Chairman, Council on Environmental Quality, *A Look Before We Leap: Applying NEPA to U.S. Actions Abroad* (Feb. 8, 1978) (given at 3d Annual Conference, Nat'l Ass'n of Environmental Professionals, Arlington, Virginia) reprinted in Yost, *American Governmental Responsibility for the Environmental Effects of Actions Abroad*, 43 ALB. L. REV. 528, 533 (1979).

an EIS.¹⁶⁰ Extraterritorial review would only require that the physical effects be addressed, that is the loss of fish, natural fertilizers, and insect control, but in ignoring the economical and social impacts (the effect on diet, the loss of income, and the attending disruption of social structures), the review would arrive at only a partial picture. If environmental documents are to be used in a balanced decision-making process, they must represent the whole affected environment and not only parts of it. Only then can environmental, technological, and economical factors be equally weighed.

The environmental review's content under the Order is less expansive than its counterpart in NEPA. The failure to require a development of alternatives and the narrowing of the concept of "environment" causes the Order's documents to be less informative. To some extent, this lack of comprehensiveness can be attributed to foreign policy sensitivities. Yet, it must be pondered whether the balance between environmental review and foreign policy has been skewed too far in favor of foreign policy considerations.

4. Circulation and Availability

Environmental review cannot be performed in a vacuum. Objectivity is lost if all major viewpoints are not assimilated. In recognition of this fact, NEPA requires extensive circulating and commenting to be conducted in the preparation of an EIS.¹⁶¹ Specifically, agencies must prepare a draft EIS,¹⁶² submit this draft for commenting to involved federal and state agencies and interested members of the general public,¹⁶³ and then include the resulting input in their final statements.¹⁶⁴ By insti-

¹⁶⁰ The case of *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972), *cert. denied*, 409 U.S. 990 (1972) (*Hanly I*), stands for the proposition that aesthetic, social and economic impacts are within the coverage of NEPA. See also *Maryland Nat'l Capital Park & Planning Comm'n v. Postal Service*, 487 F.2d 1029 (D.C. Cir. 1973).

¹⁶¹ Section 102(2)(c) of NEPA, 42 U.S.C. § 4332(2)(C) (1976), provides:

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality, and to the public . . . and shall accompany the proposal through the existing agency review processes.

See generally CEQ NEPA Implementation Regulations, 40 C.F.R. § 1503 (1978).

¹⁶² "The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act." CEQ NEPA Implementation Regulations, 40 C.F.R. § 1502.9(a) (1978). The draft statement must pay particular attention to "all major points of view on the environmental impacts of the alternatives." *Id.* For the requirements of an EIS, see note 7 *supra*.

¹⁶³ See note 160 *supra*.

¹⁶⁴ "Final environmental impact statements shall respond to comments as re-

gating a forced dialogue between proponents and opponents of a proposal, the procedure ensures that conflicting views will be heard. The purpose, quite obviously, is to require an agency to weigh, internalize, and, if necessary react to qualified opinions from other entities and individuals while formulating a specific proposal. The end result is a more environmentally-sound project. Thus, under NEPA, environmental factors enter into the decision-making process in two ways: 1) from information presented in a draft or final environmental impact statement, and just as importantly, 2) from comments on these environmental documents by other agencies and the general public.¹⁶⁵

In contrast to NEPA, Executive Order 12,114 requires only that federal agencies inform other agencies with relevant expertise, of the existence of *fully completed* environmental documents.¹⁶⁶ The Order is primarily concerned with avoiding the duplication of resources, and not with soliciting additional information to be used in the preparation of an environmental document. Absent is any action-forcing directive whereby agencies would be asked to respond to conflicting opinions. No input is sought from agencies or individuals not intimately involved in the implementation of a program.¹⁶⁷ Moreover, the Executive Order disdains the involvement of private citizens. One of the principle purposes of NEPA was to provide environmental information to the general public.¹⁶⁸ Under the Order, citizens of this country and of other nations will not only be hard-

quired in Part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised." CEQ NEPA Implementation Regulations, 40 C.F.R. § 1502.9(b) (1978). In response an agency may: 1) modify its alternatives, 2) develop new alternatives, 3) supplement or modify its analyses, 4) correct factual error, or 5) explain why the comments do not warrant response. *Id.* at § 1503.4(a).

¹⁶⁵ "All substantive comments received on the draft statement . . . should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement." *Id.* § 1503.4(b).

¹⁶⁶ Section 2-4(d) of Executive Order 12,114 states that "agencies taking action encompassed by this Order shall, as soon as feasible, inform other Federal agencies with relevant expertise of the availability of environmental documents prepared under this Order." 44 Fed. Reg. 1,957, 1,958-59 (1979). The Department of Energy reserves to its discretion the election to use draft statements or commenting procedures in the preparation of bilateral or multilateral environmental studies or concise environmental reviews. *See* Department of Energy Implementation Guidelines, 44 Fed. Reg. 52,146, 52,149, § 8.2 (1979). Other agencies, such as the Department of Defense have no provisions for circulating draft documents among other agencies.

¹⁶⁷ Even where an agency's proposed action will affect a participating foreign nation, no input from that nation need be sought. Agencies may opt to prepare concise reviews instead of bilateral or multilateral environmental studies to avoid foreign involvement. *See* Exec. Order No. 12,114 § 2-4(b), 44 Fed. Reg. 1,957, 1,958 (1979).

¹⁶⁸ "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." CEQ NEPA Implementation Regulations, 40 C.F.R. § 1500.1(b) (1979).

pressed to have their opinions heard, but will also have difficulty in even knowing that environmental review is pending.¹⁶⁹ In their regulations implementing the Order, federal agencies have either restricted access to environmental documents prepared pursuant to the Order,¹⁷⁰ or provided for the placement of these documents on public file, but without giving notice to the public that the documents exist.¹⁷¹ Under the Order there is not a requirement for agency or public involvement. As a result the documents prepared pursuant to the Order may take on the highly subjective character of a single agency's opinion.

The comparison of NEPA's review to that of the Executive Order is one of degree. The Order's environmental documents are geared to provide *environmentally-acceptable* proposals. These are proposals where there are not so many environmental defects as to make the project untenable. On the other hand, some have interpreted NEPA as necessitating more than just environmentally-acceptable proposals; but in fact requiring a maximization of the mitigation of adverse environmental impacts.¹⁷² By eliminating the commenting procedure, the Order does not require the best feasible proposal, but rather settles for an acceptable one. In this regard it is inferior to NEPA.

5. Judicial Review

Agency violations of the Executive Order do not give rise to a cause of action.¹⁷³ The greatest complaint of federal agencies regarding CEQ's aborted attempt to extend NEPA to extraterritorial activities was that the regulations would make agencies susceptible to private enforcement

¹⁶⁹ It is at the discretion of the preparing agency, in consultation with the State Department and the Council on Environmental Quality, to let an environmentally affected nation know the results of the review concerning it. Exec. Order No. 12,114, § 2-4(d), 44 Fed. Reg. 1,957, 1,958-59 (1979).

¹⁷⁰ See, e.g., Department of State Implementation Guidelines, 44 Fed. Reg. 67,004, 67,008, Subpart B(3)(i) (1979).

¹⁷¹ See Overseas Private Investment Corporation Implementation Guidelines, 44 Fed. Reg. 51,385, 51,387 (1979) (Section 8); Department of Defense Implementation Regulations, 32 C.F.R. § 197.6, Enclosure 2, § D(5) (1979).

¹⁷² See *Davis v. Coleman*, 521 F.2d 661, 670 n.12 (9th Cir. 1975); Note, *The Least Adverse Alternative Approach to Substantive Review under NEPA*, 88 HARV. L. REV. 735 (1975). Cf. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (NEPA concept of alternatives must be bounded by some notion of feasibility); *Seacoast Anti-Pollution League v. Nuclear Regulatory Comm'n*, 598 F.2d 1221 (1st Cir. 1979) (Nuclear Regulatory Commission did not violate NEPA requirement of studying alternative sites absent showing that sites had more than remote and speculative advantages).

¹⁷³ "This order is solely for the purpose of establishing internal procedures for Federal agencies . . . and nothing in this Order shall be construed to create a cause of action." Exec. Order No. 12,114, § 3-1, 44 Fed. Reg. 1,957, 1,960 (1979).

actions.¹⁷⁴ Timing considerations in conducting foreign policy seemingly require that agencies not be enjoined via citizen suits from completing their appointed tasks.¹⁷⁵ The Executive Order responded to this criticism by barring all private enforcement of extraterritorial review requirements. The result is that agencies are left to their own conscience in applying the Executive Order.

NEPA's strength has always heavily depended on effective judicial review.¹⁷⁶ There is no doubt that NEPA creates a right of action for adversely affected parties.¹⁷⁷ Under NEPA parties are "adversely affected" when either their environmental interests are infringed¹⁷⁸ or when they are denied access to environmental information.¹⁷⁹ The value of judicial review is that it requires federal agencies to strictly adhere to their environmental-review responsibilities. It is a guarantee that agencies will not ignore their own environmental regulations by abusing discretion. As Judge Bazelon of the District of Columbia Court of Appeals wrote: "Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion."¹⁸⁰ Judicial scrutiny through private enforcement actions operates as a check on agencies' use of discretion. It prevents review requirements from becoming lost in a wave of modifications, exemptions, and exclusions.

Given the wide discretion afforded to agencies by the Order, it is doubtful that a plaintiff could find an enforceable duty either in its text or implementation regulations.¹⁸¹ The Order allows agencies to use dis-

¹⁷⁴ See notes 67-73 *supra* and accompanying text.

¹⁷⁵ See note 99 *supra* and accompanying text.

¹⁷⁶ *Calvert Cliffs' Coordinating Committee v. Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971).

¹⁷⁷ *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 319 (1975). See also 40 C.F.R. § 1500.3 (1978).

¹⁷⁸ For example, a member of an environmental group is adversely affected if he has frequented an area where environmental integrity is threatened by the proposed action. See generally, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Scenic Rivers Ass'n v. Lynn*, 520 F.2d 240 (10th Cir. 1975), *rev'd*, 426 U.S. 390 (1976).

¹⁷⁹ See *Scientists' Inst. for Pub. Information v. Atomic Energy Comm'n*, 481 F.2d 1079 (D.C. Cir. 1973).

¹⁸⁰ *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971).

¹⁸¹ In spite of the Order's claim, it might be possible to enforce extraterritorial review requirements where there has been a clear abuse of discretion resulting in the infringement of a legal right, *e.g.*, due process. See *Administrative Procedure Act*, 5 U.S.C. § 702 (1976). The chances of winning such a suit are highly remote for agencies may always point to foreign policy interests as dictating the use of discretion. The strong language of the Order categorizing the review requirements as internal procedures also minimizes these chances. See Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629 (1974).

cretion in choosing to review an action, determining the scope of review, deciding which procedures to use, and providing for the availability of a completed document. Absent judicial review, this discretion becomes a license to review or not to review depending on an agency's own interests.¹⁸² Agencies suffering from time constraints or budgetary problems need not be concerned with private enforcement suits if they forego environmental review. Therefore, the Order is unbalanced. It provides for discretion, but does not furnish a check on the abuse of discretion. The end result is that extraterritorial environmental review is uncontrolled and lacks direction. In the absence of consistent application there remains a chance that the environmental hazards which the Order attempted to avoid will still occur.

V. CONCLUSION

The Executive Order does not further the purposes of NEPA because it does not strike a proper balance between foreign and environmental policy considerations. Its excessive allocation of administrative discretion serves to devitalize its environmental review requirements. In an attempt to mollify federal agencies and address their criticisms with respect to the expansion of environmental review, the Order has created a procedure which is so flexible as to be merely suggestive. Many actions will not require review; those that do, may receive scant treatment; and the general public of this and other countries are prevented from intervening. The Order places far too much emphasis on the protection of foreign diplomacy, while sublimating equally important environmental concerns.

The government's basic premise seems to be that environmental review interferes with foreign nations' internal affairs. However, quite the opposite can be true. By failing to take adequate environmental precautions, the United States may cause an extreme disruption in the environment of another country. This clearly affects another nation's internal affairs.

Courts have demonstrated that they will not extend NEPA without specific congressional or executive authorization. It can be expected that the judiciary will interpret the Executive Order as demonstrating an intent not to apply NEPA to foreign activities. If this is the case, a judicial extension of NEPA is not forthcoming. For NEPA to be properly extended, CEQ would have to oversee the agencies' implementation of NEPA foreign regulations. Given CEQ's close ties with the executive

¹⁸² See *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Atchison, Topeka and Santa Fe Railway Co. v. Callaway*, 431 F. Supp. 722 (D.C.D.C. 1977); *City of Santa Clara v. Kleppe* (Secretary of Interior), 418 F. Supp. 1243 (N.D. Cal. 1976), *modified sub nom.* 572 F.2d 660 (9th Cir. 1978), *cert. denied*, 439 U.S. 859 (1978).

branch, such a move is unlikely. Thus a judicial or executive extension of NEPA will probably not occur.

This leaves a legislative solution to the extraterritorial problem. An effective statute would have to exhibit the following characteristics: 1) its processes must be time and cost efficient; 2) it must reflect the sensitivities inherent in the conduct of foreign policy; 3) it must change the organic mandates of all federal agencies to allow for the prioritization of extraterritorial environmental review; 4) its language must be strong enough to exact consistent application of environmental review requirements; 5) it must direct the consideration of alternatives and social and economic impacts; 6) major federal actions governed by the statute must include not only the exportation of toxic and radioactive materials, but also the construction of major facilities and the approval of major development programs; 7) it must require that documents be circulated; and 8) there must be limited private enforcement to operate as a balance against the abuse of administrative discretion.

Legislation embodying all these requirements might feature a requirement that environmental impact statements be prepared for all major federal construction projects and development projects having useful lives over twenty years in duration. All other proposals could require the preparation of an environmental assessment, thus greatly reducing federal agencies' time and cost expenditures for environmental review. Provisions could also be designed to allow for limited judicial review. This might be accomplished by requiring agencies to submit their completed documents to CEQ and the State Department. If either of these agencies determined that environmental review requirements had been violated, then private enforcement suits could be filed. At all times, environmental review requirements should demand an analysis of the complete environment. Alternatives and socio-economic impacts must never be excluded.

The extraterritorial issue has not been solved. Executive Order 12,114 does not displace NEPA, for its requirements are weak and incomplete in comparison to their domestic counterparts. Foreign policy and environmental considerations can be balanced. It is essential for the continuing well-being of third world nations that this balancing take place. The final realization must be that we live on one planet, and we share a common responsibility to protect it.

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